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Supreme Court of the United States

OCTOBER TERM, 1968

No. 14

COMMONWEALTH COATINGS CORPORATION,

Petitioner,

—v.—

CONTINENTAL CASUALTY COMPANY, FIREMAN'S FUND INSURANCE COMPANY and A. C. SAMFORD OVERSEAS, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF OF PETITIONER

EMANUEL HARRIS
Attorney for Petitioner
30 Vesey Street
New York, New York 10007
Telephone (212) 267-5700

EMANUEL HARRIS
MAX E. GREENBERG
SAYWARD MAZUR
On the Brief

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OTHER AUTHORITY:

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Errors, Omissions and Misstatements in Respondents' Brief

1.

On page 39 of respondents' brief in the statement of petitioner's counsel with reference to the challenge to the award, respondents fail to include the portion of the statement which is italicized as follows:

> " . . . this isn't an allegation of fraud against the arbitrators, *but against Samford Company. They failed to disclose certain business relations with one of the arbitrators*" (R. IV, 137 (2)). (Italics ours.)

2.

On pages 130 and 133 of respondents' brief, in an attempt to show a "credibility gap" of petitioner, there is stated as though it were evidence instead of merely an extract from a statement of respondents' counsel, petitioner's alleged breaches of contract and "poor" performance of its work. Respondents omit from the quotation of the statement of their counsel the words at the commencement thereof as follows (R. III, 116 (c)):

"Samford counterclaimed that"

The omission from the quotation in record submitted to this Court as a correct quotation from the record could not have been other than deliberate to give the impression that the evidence established breach of contract by petitioner, whereas counsel was merely stating what the counterclaim was. Such misstatement, without reference to evidence to support the same also occurs on pages 11 and 12 of respondents' brief. The arbitration award contains no such findings (A. 34).

3.

On pages 54 and 55 of respondents' brief it is stated that petitioner waived and ratified the qualifications and competency of Capacete by its "active participation and deliberate submission" to him and the other arbitrators for decision of the dispute regarding the effect, if any, on the arbitration award of the order in the New York bankruptcy proceedings of Samford staying litigation. Reference in support of such statement is made to R. V. 138 (35). The true situation is disclosed in the record in the statement of

petitioner's counsel to the District Court as follows (R. V. 138 (35)):

> "Mr. Romero: I want to clarify the point. The way they have been pleading in these cases, Your Honor will remember when we tried to continue the case against the bonding companies, Mr. Ramirez (respondent's counsel) said this court can't do anything, there is a stay order in a bankruptcy proceeding. *That's when your Honor ordered that we go to see if we could try it with the arbitration or obtain authority from the bankruptcy court. We did go to arbitration, we did show them what the Court wants, we never got anything from the arbitrators, that's when we came back*". (Italics ours.)

4.

Throughout their brief, respondents contend that petitioner never made any inquiry with respect to business relations, "directly or indirectly" between Capacete and respondents, and that the "record" clearly shows this "definitely and without question" and that there is no evidence in the record of such inquiry (Respondents' Brief, pp. 28-29, 43, 47).

Respondents inconsistently with its own statements and contentions nevertheless devote four and a half pages of their brief (pp. 51-55) to an attempt to discredit the affidavit in the record of Mr. Romero's (petitioner's counsel) affidavit which is directly to the contrary and which states that at the time of the designation of the arbitrators and prior to the arbitration hearings he *did* investigate the arbitrators to discover if any of them had, in the present

or past, any business or financial relationship, with respondent Samford or any of its affiliates or holding companies or with Samford himself, that he found none, and that none of the arbitrators ever informed him of such relations (A. 54).

Respondents in their brief argue as though there was an absence of inquiry (Resp. Br. p. 35), thus again completely ignoring the affidavit of Mr. Romero in the record that inquiry was in fact made.

In this connection, respondents admit in their brief (p. 98) that petitioner's counsel personally talked to Capacete about possible qualified arbitrators (A. 145) yet it is not denied that even at this time, when the arbitrator previously designated by petitioner had died and a new arbitrator was being considered, Capacete did not even then see fit to disclose to his "good friend" (A. 146) his previous relations with Samford.

5.

Respondents also assert in a footnote in their brief that petitioner for the first time in this litigation argued in its reply brief in this Court that it made inquiry "of respondents and/or Mr. Capacete" (Resp. Br. p. 28). This statement also is a total misstatement of the record. The Romero affidavit in the District Court was made on February 6, 1964 (A. 54), in support of the petition to vacate the award (A. 60). Respondents in their answer to the petition referred to Mr. Romero's affidavit and denied that it "proves anything with respect to Mr. Capacete" (A. 65). They did not deny that the investigation was made (A. 65). On the hearing in the District Court, respondent's counsel repeated the denial in the same language and stated that "defendant

is without sufficient knowledge or information to form a belief as to the truth of the allegations concerning what statements were made by Mr. Capacete to plaintiff's attorney", thus admitting that petitioner's counsel did make inquiry of Capacete (A. 78).

The affidavit of Mr. Romero was, of course, included in the record in the Court of Appeals (Appellant's Appendix, p. 54a). In its brief in the Court of Appeals petitioner referred to the affidavit in support of its appeal based on the failure of Capacete to make disclosure to Mr. Romero at the time of latter's inquiry (Petitioner's Brief in Court of Appeals, p. 6).

In its petition to this Court for a writ of certiorari (p. 7), petitioner again referred to Mr. Romero's affidavit, and again in its reply brief in support of the petition (p. 2).

Finally, the contention now made by respondents (Resp. Br. 28) that the point as to the investigation of the arbitrators was first made by petitioner in the reply brief to this Court was the ground for the respondents' petition for rehearing of the order granting certiorari by this Court on April 22, 1968, which petition was denied.

6.

Although Capacete testified that he personally performed services for respondent Samford, using the pronoun "I" (A. 136) in his testimony, respondents, throughout their brief (pp. 21, 22, 26, 27, 33, 36), refer to transactions between Samford and Capacete's company, Foundation Engineering Company, and not to Capacete's personal participation in such services. Respondents even state that all of the services were rendered by the Company, and not "in his own personal capacity" (Resp. Br. pp. 21, 26).

Such distortions of the record are apparently made in a vain effort to show that there was no concealment, because the transactions were between Capacete's company and Samford and not by Capacete personally. The extent to which respondents distort and misquote the record is shown by the reference in its brief to the question asked of Mr. Romero upon the hearing in the District Court as to whether he would have objected had he been told about *Capacete's* relationship with Samford (A. 151). Respondents refer to the question as having been asked as to the relationship between Samford and Foundation Engineering Company (Resp. Br. p. 40).

And in quoting the answer of Mr. Romero, to such question, in their brief (p. 40), respondents deliberately omit the following italicized portion of the answer (A. 151).

> "I don't think I would have objected because I know Mr. Capacete, *but I would certainly have told my client and given them the opportunity to determine.*" (Italics ours.)

Respondents in their brief (p. 40), also omit the next question and answer (A. 151).

> "So as a result you never told them? A. No."

7.

Respondents in their brief completely ignore the testimony of Capacete that *he* rendered the services, and that *he* owned the Foundation Engineering Company, which he supervised "naturally" *and that Samford was aware of that fact* (A. 136). Indeed, Capacete even "imagined" that Mr. Currie, respondents' counsel, was also aware of that fact (A. 136).

In any event, even if Capacete's services for Samford were rendered as a representative of his company, this of course was no justification for Capacete's and Samford's failure to disclose the relationship. The contention by respondent on this point is utterly without merit.

8.

Respondents also assert in their brief that "the grand total of all fees paid by all Samford's companies to Mr. Capacete's firm during this six year period was "only . . . in the order of $12,000.00" (Resp. Brief p. 24). Are we to understand from such contention that the duty and obligation of an arbitrator to disclose prior business and financial relationships depend on the amount he has received? Are we to understand from such contention, that the respondents wish this Court to determine the specific amount, in excess of $12,000.00, or the percentage of the arbitrator's gross income which would give rise to the duty and obligation to disclose the information which would disqualify him? Or that the payment to Capacete or his firm of only $12,000 was not sufficient in amount to establish partiality and to justify concealment?

9.

Respondents also make the contention that Capacete's services were in drilling for foundation investigation and testing related to site preparations, whereas petitioner's claims involved painting work on the very same projects (Resp. Br. p. 26).

Apparently, it is respondent's contention that the duty and obligation to make disclosure depend on the nature of the work performed by the arbitrator as distinguished from

the work performed by petitioner and that the duty and obligation arise only when the work of the arbitrator and the petitioner are the same in kind. The very statement of the contentions emphasizes its absurdity.

10.

We submit that the contentions of the respondents that the award herein should be sustained because a) the services of Capacete were rendered for the benefit of his company and b) that his company received only $12,000.00 and c) that the services were different from the work performed by petitioner, are so completely without merit as to be frivolous.

The Appointment of the Arbitrators

Respondents state in their brief (p. 131) that the official record of the arbitration proceedings reveals that it was not until after the Federal Court stayed petitioner's lawsuits against respondent Samford's sureties that petitioner designated an arbitrator who was willing to serve (Resp. Br. p. 131). No reference to the record is given to support such statement. The record is to the contrary.

The exhibits annexed to the sureties' motion for a stay of the suits, give the true statement with reference to the appointment of the arbitrators (R. I. 10, Exhibits 1-18).

On June 13, 1962, petitioner wrote to Samford advising that it was stopping work because of the failure of Samford to make payments (Exs. 1-5).

On July 5, 1962, Samford wrote to petitioner demanding arbitration on the five subcontracts (Exs. 1-5).

On July 27, 1968, Samford wrote to petitioner again demanding arbitration and designated Dwight Chapman as an arbitrator (Ex. 6).

On August 1, 1962 petitioner wrote to Samford agreeing to arbitration and designating Pedro Pons as an arbitrator. (Ex. 7).

On August 6, 1962, Samford agreed to one arbitration on the five contracts, on condition that the third arbitrator be named by the other two arbitrators and not by the architect (as provided by the arbitration clause in the contract) (Ex. 9, A. 46-47).

Between August 17, 1962 and December 15, 1962 correspondence between Samford and petitioner followed with reference to negotiations between the parties, culminating in a rejection by Samford of an offer by petitioner's attorney to settle for the sum of $95,000 (Exs. 11-16).

On November 26, 1962, petitioner filed suit against Samford's sureties (A. 2, 12).

On January 3, 1963, Mr. Chapman, the arbitrator designated by Samford, wrote to Samford that Mr. Pons the arbitrator designated by petitioner would not serve (Ex. 17).

On January 18, 1963, Mr. Currie, counsel for respondents, wrote petitioner that he represented Samford, that Mr. Pons refused to serve and to advise suggestions for filling the vacancy (Ex. 18).

Thereafter, petitioner selected an attorney named Aaron Holman as its arbitrator (A. 145). Respondents state in their brief (p. 9) that Holman was named after the sureties obtained the order staying the suits against them, but

there is nothing in the record to substantiate such statement.

Chapman and Holman designated Capacete as the third arbitrator (A. 145). Two or three days after the first meeting of the Board, Holman died (Capacete testimony, p. 145). Respondents make another misstatement in their brief (p. 9) to the effect that Holman died before the hearing could commence.

On June 17, 1963 Capacete wrote to Samford and petitioner reporting the death of Holman (Resp. Br. p. 56).

Thereupon, on June 25, 1963, during the very time that respondents were concealing Samford's previous relations with Capacete, Mr. Currie, counsel for Samford, wrote to the surviving arbitrators Capacete and Chapman, with a copy to petitioner's counsel (Resp. Br. p. 58) that to prevent the loss of the efforts and understanding of the two arbitrators appointed by the opposing parties in agreeing upon and selecting Mr. Capacete as the third arbitrator, Samford stipulated that *if* Chapman and *Capacete would continue* to serve,* then Commonwealth may immediately appoint a third arbitrator to fill the vacancy caused by the death of Mr. Holman, *without Samford's consent, but subject only to the right to object if the person selected is disqualified because of interests or involvements in the matters being arbitrated* (Resp. Br. p. 57).

It is this letter which petitioner's counsel referred to in the District Court as "evidence of a guilty conscience" and

* Capacete admitted that at one time he was going to resign from the Board of Arbitration and wrote a letter to the parties to that effect, and that he mentioned it to Mr. Currie, who requested him to stay as chairman of the Board as he said "all right, I will, and I stayed" (A. 135).

that Samford was making sure "the same situation" did not exist on petitioner's side (A. 88, 89).

Mr. Currie's response to the above statement of petitioner's counsel was that the reservation of the right to object was "a very reasonable thing and quite understandable" (A. 92). Apparently, it was "reasonable and understandable" for Samford to object to an arbitrator because of "interests" and "involvements" but not so for petitioner.

The Business Relations Between Capacete and Samford

Respondents contend throughout their brief that the business relations between Capacete and Samford were "remote", "isolated", "casual", "unrelated", "superficial", "insignificant", "occasional" and "very limited" (Resp. Br. pp. 1, 37, 47, 66, 76, 81, 107, 113, 134).

The Court of Appeals said (A. 193-194):

> "We may agree with appellant that where there is a *disturbingly close relationship* the very failure to make disclosure could be evidence of partiality, and we think it *would have been far better if there had been disclosure here.* However, we cannot say that this relationship was sufficiently close to establish evident partiality within the statute as a matter of law." (Italics ours.)

The Court of Appeals did not hold that the relations were "remote", "isolated", "insignificant", etc., as contended by respondent. On the contrary it held, in effect, that they were of such a nature that it would have been "far better"

if they had been disclosed. How much closer could the rendition of services by Capacete for Samford and payment therefor by Samford on the very projects involved in the arbitration be? Could there be a more "disturbingly close" relationship or a more sufficiently close relationship to establish evident partiality as a matter of law?

The entire tenor of respondents' brief is that notwithstanding the failure to make disclosure, the record does not show partiality in the arbitration hearings and that therefore the decision of the Court of Appeals should be affirmed.

Respondents concede in their brief that the arbitration involved a "magnitude and intensity of the heated and active dispute between the parties, two corporations, including many contested and contradicted contentions" (Resp. Br. p. 61). Who can say the rulings upon these questions were not affected by Capacete's secret and undisclosed business relationship with Samford?

It is significant that the arbitrator Munoz, who was chosen by petitioners from a list of attorneys given by Capacete to petitioner's counsel, as having had something to do with engineering cases (A. 145), testified as follows (A. 162):

> "I was dependent more on the technical questions on the cost items. I was depending more on Mr. Capacete as the expert and *the third member.*" (Italics ours.)

The reliance of Munoz upon Capacete *as the third member* of the board of arbitrators, indicates the importance of the position of the third or neutral member of a tripartite board of arbitrators.

Respondent's in their brief omit completely any discussion of the responsibility of the neutral arbitrator as distinguished from the arbitrators designated by the parties themselves. Respondents thus ignore the principle of law that in a tri-partite arbitration, the third or "neutral" arbitrator is held to a stricter standard of impartiality than the other arbitrators. Such stricter standard obviously includes a requirement that at least such "neutral" arbitrator must disclose that he is not in truth a "neutral" arbitrator.

Respondents attempt to avoid the facts as to concealment with phrases such as "no duty to volunteer information" (pp. 35, 38) information "not volunteered" (p. 45), "the duty is . . . not one of volunteering any and all information" (p. 46) "concealment . . . an allegation implying much more than merely not volunteering information" (p. 50) "volunteering of information as to relations likely to disqualify" (pp. 86, 87) "volunteer unsolicited information" (p. 87).

Respondents in their brief quote dictionary definitions of "evident", "partiality" and "partial" (Resp. Br. p. 62).

Respondents carefully omit any definition of "conceal" or "concealment" as those terms appear in Webster's Encyclopedia Dictionary, as follows:

"Conceal: . . . to hide . . . to cover . . . *to keep close or secret; to forbear to disclose; to withhold from utterance or declaration*"

"Concealment: The act of concealing, hiding or keeping secret."

The astounding contention of respondents, throughout its brief, that they were not required to volunteer information which would disqualify Capacete as an arbitrator (Resp. Br. p. 63), if upheld, would open the door to such corruption and fraud in arbitration and all judicial and extra judicial proceedings that it would undermine the administration of justice either through arbitration or litigation.

Even the Court of Appeals in its decision herein, in referring "to what should, in good faith, be volunteered and what may be left for inquiry", held that it would have been far better if there had been disclosure here.

It is stated by respondents in their brief (p. 16) that "*Samford has always stated, when asked,* that Foundation Engineers Company, Capacete's Company, had performed services for Samford (Resp. Br. p. 16). This is another gross misstatement of the record. No representative of Samford ever took the stand to give any testimony whatever with respect to its relations with Capacete.

The Alleged Admissions as to Capacete's Integrity

Respondents in their brief quote alleged "admissions" by petitioner's counsel as to the integrity of Capacete (Resp. Br. pp. 38-40). In not a single instance did petitioner's counsel admit that the arbitration proceedings or the award were not affected by the prior relations between Capacete and Samford.

On the contrary, petitioner's counsel stated to the District Court that the undisclosed relations were the ground for setting aside this award (A. 75, 88), and petitioner's counsel testified in support of the motion to vacate the award on the ground of the concealment and stated in his testimony that Mr. Currie, counsel for respondents, never at any time during any of the examinations or before the arbitration, tell him anything about Capacete's prior relationship with the Samford Company (A. 151).

The first petition to vacate the award was expressly made on the ground of evident partiality based on the failure to make disclosure and that Capacete "was not entirely disassociated, objective, wholly pure and impartial", that the award was wholly as a result of the evident partiality of at least one of the arbitrators (A. 37, 48). The second petition to vacate the award was made on the ground of fraud by Samford and Capacete in failing to make disclosure (A. 55-56, 60).

Notwithstanding the contentions made in the petitioner's entire brief to this Court based wholly on the ground that the award was invalid because of the failure of Capacete and Samford to disclose their prior relationship (Peti-

tioner's Br. pp. 3, 6, 7-15) and that such failure constituted evident partiality, corruption and fraud and misbehavior under the Statute (Petitioner's Br. pp. 16, 17-23), amazing statements are made in respondents' brief, that petitioner admits there was no actual partiality or bias on the part of Capacete (p. 34), that petitioner admits that Capacete was not actually partial or biased, in any respect (p. 38) and that petitioner is not arguing that the decision of the arbitration has in any way been affected by the previous business relationship between Samford and Foundation Engineering Company and that petitioner has made no allegation that the relationship had any actual effect on Mr. Capacete or the outcome of the arbitration proceedings, and that petitioner does not argue that the arbitration proceedings were unfair in any way or attempt to cast any suspicion on Capacete (Resp. Br. pp. 76, 87).

The *Ilios* Decision

Both the District Court and the Court of Appeals cited *Ilios Shipping and Trading Corp.* v. *American Anthracite & Bituminous Coal Corp.*, D. C. N. Y. 1957, 148 F. Supp. 698, aff'd 2 Cir., 245 F. 2d 873, in their decisions (A. 185, 193). That case is readily distinguishable from the case at bar. In *Ilios* the party seeking to vacate the award had knowledge before the arbitration of the business relations between the arbitrator and the opposing party.

The Court there said (p. 700):

> "However, even more important is the fact disclosed in the moving papers that the respondent knew before the arbitration that Mr. Ellison was in the insurance business and associated with John F. Curry Agency,

Inc., and that respondent could have inquired concerning the business relationship of his firm to any party interested in the arbitration. *Where a party has knowledge of the facts possibly indicating bias or partiality on the part of an arbitrator he cannot remain silent and later object to the award of the arbitrators on that ground. His silence constitutes a waiver of the objection.*" (Italics ours.)

It is undisputed that petitioner in the instant case had no knowledge of the relations between Capacete and Samford. Capacete admitted the failure to disclose the same (A. 27). No representative of Samford took the stand to deny the concealment. Neither Samford nor their attorneys ever advised Capacete that the matter should be disclosed (A. 136). Capacete even stated that he had no reason to believe that the matter should be disclosed (A. 137).

Respondents Are Responsible for the Invalidity of the Award

Respondents state in their brief that an annulment of the instant award would "frustrate the major purpose of arbitration, namely to provide a quick, final and inexpensive form of relief" (Resp. Br. p. 92). Respondents refer to the "thousands of hours of work required to arbitrate and resolve the complex disputes" (p. 92).

But respondents themselves, in secret co-operation with Capacete, the supposedly "neutral" chairman of the Board, by their concealment of the information which has vitiated this arbitration, are responsible for the present invalidity of the award. They have subjected petitioner to the tremendous burden and expense of carrying through this arbi-

tration when wholly unaware of the previous relation between Capacete and Samford on the very same projects involved in the arbitration. And to add insult to injury, respondents in their brief, even complain that petitioner has not paid their half of Capacete's $3,000.00 fee! (Resp. Br. p. 132)

Respondents, in their brief attempt to criticize the petitioner's performance of the subcontracts and its conduct during the arbitration proceedings, with ridiculous allegations such as "fleeing from cross-examination", failure to keep an eight o'clock appointment, etc. (Resp. Br. pp. 116-139).

The only issue before the Court of Appeals noted in its decision as "the sole ground of the appeal" was the failure of Capacete and Samford to disclose their past relationship (A. 193). Respondent did not urge in the Court of Appeals any alleged misconduct on the part of the petitioner in the arbitration proceedings or argue any point other than the failure to make disclosure (Resp. Br. in Court of Appeals).

Certiorari was sought in this Court and granted on the question as to whether the failure of Capacete and Samford to disclosure their prior relations was sufficient ground to vacate the award and constituted corruption and fraud in the procurement of the award, and misbehavior on the part of Capacete, within the provisions of the Federal Arbitration Act (Petition for Certiorari, p. 2). There was no discussion either in the petition for certiorari or the brief in opposition thereto as to any misconduct of petitioner or "abuses of the arbitration process" (Resp. Br. p. 116).

Respondents quote the proverb in their brief that "the guilty flee when no man pursueth" (Resp. Br. 25). We

submit that the attribute of "guilt" which respondents apply to petitioner, in truth and fact applies to respondents.

In any event, the conduct of petitioner during the arbitration proceeding is not a question submitted to this Court for review. If this Court should decide that the arbitration award herein is invalid within the provisions of the Federal Arbitration Act, the merits of the claims and counterclaims of petitioner and respondent will be presented and determined later in the proper forum.

CONCLUSION

The arbitration award herein should be set aside and the relief prayed for in petitioner's main brief (p. 31) should be granted, with costs of all proceedings.

Respectfully submitted,

EMANUEL HARRIS
Attorney for Petitioner
30 Vesey Street
New York, New York 10007
Telephone (212) 267-5700

EMANUEL HARRIS
MAX E. GREENBERG
SAYWARD MAZUR
On the Brief